WINSTON & STRAWN LLP

BEIJING
CHARLOTTE
CHICAGO
GENEVA
HONG KONG
HOUSTON
LONDON
LOS ANGELES

1700 K STREET, N.W.
WASHINGTON, D.C. 20006

+1 (202) 282-5000

FACSIMILE +1 (202) 282-5100

www.winston.com

MOSCOW
NEW YORK
NEWARK
PARIS
SAN FRANCISCO
SHANGHAI
WASHINGTON, D.C.

January 9, 2012

Mr. V.V. Veeder, QC
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Prof. Vaughan Lowe, QC
Essex Court Chambers,
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Dr. Horacio Grigera Naón
2708 35th Place N.W.
Washington, DC 20007
USA

Mr. Martin Doe
Permanent Court of Arbitration
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Dear Members of the Tribunal,

Pursuant to the Tribunal's correspondence of January 5, 2012 and January 6, 2012, the Republic hereby responds to the Claimants' letter of January 4, 2012. In its letter, the Claimants request the Tribunal "immediately to (i) convert the order dated February 9, 2011 (the 'Interim Measures Order') into the form of an Interim Award, as the Tribunal contemplated in the Order; and (ii) request that the Republic of Ecuador inform the Tribunal, by this Friday, January 6, 2012, of the steps that it intends to take to comply with the Interim Measures Order and prevent the Lago Agrio Judgment from becoming enforceable." Jan. 4, 2012 Cl. Ltr. at 2.

While the Claimants have raised a number of legal and evidentiary arguments in their letter, it is far from clear how they relate to these two requests. For instance, the Claimants have cited "[n]ew evidence" that allegedly "proves that the Plaintiffs' representatives drafted the Lago Agrio Judgment." *Id.* at 3. The Republic will comment upon this "[n]ew evidence" in due course in this letter but it is important to emphasize that this latest manifestation of the Claimants' allegation of fraud is fundamentally different from the case it put before the Tribunal to justify the imposition of the Interim Measures Order in the first place. The Tribunal will recall that the thrust of the Claimants' case was that the Plaintiffs' representatives colluded with the environmental expert appointed by the *Lago Agrio* Court, Mr. Cabrera. The Claimants appear no longer to rely upon that allegation; no doubt because it was dealt with by Judge Zambrano, who resolved to place no reliance on Mr. Cabrera's report.

The Claimants' "[n]ew evidence" relates to an entirely different allegation, which by definition was not before the Tribunal when it made the Interim Measures Order because Judge Zambrano's Judgment had not been issued at that time. The allegation of "ghostwriting" was put before the Court of Appeals by Chevron and it was dismissed. The Claimants' assertion that the Court of Appeals "simply refus[ed] to address the evidence of such fraud" is manifestly wrong; the Court of Appeals plainly did consider that allegation. *See* discussion *infra* at 12-13.

The Claimants have not suggested that the Court of Appeals' judgment was tainted by fraud or "ghostwritten."

It is clear that the justification for interim measures based upon the Claimants' original factual case has now expired in light of Judge Zambrano's Judgment and its affirmation by the Court of Appeals. The Claimants have not advanced any claim in respect of the substance of Judge Zambrano's Judgment or the decision of the Court of Appeals in this arbitration. There is therefore no prima facie jurisdictional link between the new allegation of fraud said to justify interim measures and the claims asserted in this arbitration. The Respondent respectfully requests that the Interim Measures Order be vacated.

The Respondent will now deal with each of the Claimants' requests but in reverse order. The Claimants have provided no explanation as to why the Tribunal's Interim Measures Order should be converted into an Interim Award and the Respondent reserves its right to comment upon any such explanation that may be provided subsequently by the Claimants.

I. The Republic Has Complied With The February 9, 2011 Interim Measures Order

The Claimants' Request is premised upon an allegation that the Respondent has hitherto failed to comply with the Interim Measures Order and has even "taken affirmative steps to promote the Judgment's enforcement." Jan. 4, 2012 Cl. Ltr. at 7. This allegation is demonstrably false. The Claimants' Request is also premised upon an alleged obligation on the part of the Respondent to take measures that would violate its Constitution and laws. The Interim Measures Order imposes no such obligation.

The Claimants have twice before requested that the Tribunal require the Republic to take additional steps to prevent enforcement of the *Lago Agrio* Judgment. The Republic has twice before explained that the Claimants' requested measures would compel Ecuadorian officials to violate Ecuadorian law. On both occasions this Tribunal has declined to require the Republic to violate its own law. The Republic has fully complied with the Tribunal's Interim Measures Order by taking "all measures at its disposal" and notifying the Tribunal of the steps taken. Interim Measures Order (Feb. 9, 2011) at 3-4 ¶ (E); *see also* Feb. 24, 2011 Resp. Ltr. at 2-4.

The Tribunal will recall that the Claimants (i) first sought interim measures on April 1, 2010, (ii) requested additional interim measures on October 27, 2010, and (iii) then requested yet

more interim measures on January 14, 2011. In their January 14, 2011 interim measures request, Claimants asked the Tribunal to enter interim measures which, as the Republic explained at the February 8, 2011 hearing, would have required the Republic to violate Ecuadorian law. While this Tribunal elected to impose interim measures, it pointedly declined to adopt Claimants' proposal. Interim Measures Order (Feb. 9, 2011) at 3-4 ¶ (E). Instead, the Tribunal required that the Republic "take all measures *at its disposal* to suspend or cause to be suspended the enforcement or recognition" of the *Lago Agrio* Judgment and notify the Tribunal of the steps taken. *Id.* (emphasis added). The Republic immediately complied and notified this Tribunal of the steps it had taken. *See* Feb. 24, 2011 Resp. Ltr. at 2-4. Clearly, neither of the parties nor the Tribunal contemplated that the mere rendering of a judgment by the *Lago Agrio* judge or any appellate court reviewing that judgment would constitute a violation. Indeed, Chevron gave an undertaking to the United States Court of Appeals for the Second Circuit that it would not request any measures from this Tribunal that would have the effect of preventing entry of a *Lago Agrio* Judgment. *See* discussion *infra* at Part III.

Approximately four weeks after issuance of the February 9 Interim Measures Order, and about a week after the Republic advised the Tribunal of the measures it had taken to comply, the Claimants argued to this Tribunal that the Republic's efforts were insufficient and that the Republic "can, and must, do more to comply with the Order both 'within and without Ecuador.'" Mar. 4, 2011 Cl. Ltr. at 8. The Claimants, ignoring the Tribunal's decision not to require the Republic to violate Ecuadorian law, again demanded that the Republic implement the "specific mechanisms" identified in their January 14, 2011 letter. *Id.* On March 16, 2011, the Tribunal *again* declined to require the Republic to take the steps sought by the Claimants. *See* Procedural Order No. 7 (Mar. 16, 2011) at ¶ 9.

The Claimants' insistence that the Republic violated the Interim Measures Order by failing to take certain measures that this Tribunal specifically declined to order is nonsensical. Yet now, almost a year later, the Claimants again demand that the Republic take steps substantially the same as those the Tribunal has already rejected; indeed the Claimants simply cross-refer to their previous pleadings. Jan. 4, 2012 Cl. Ltr. at 2. The Claimants also justify their latest request by arguing that the Republic has now "taken affirmative steps towards securing [the *Lago Agrio* Judgment's] enforcement." *Id.* at 3. The easiest way for the Tribunal to discern the baseless nature of Claimants' assertion that the Respondent has violated the Tribunal's pending order on interim measures is to note that both of the events cited by Claimants took place between three to seven months ago. If the Respondent's conduct had violated the Tribunal's measures then why would the Claimants have waited so long to raise this issue before the Tribunal?

In any event, each of these events is addressed in turn. First, the Claimants point to an out-of-context quote from one of the Republic's Section 1782 discovery applications. As the Claimants know, the Republic's Section 1782 action simply seeks discovery "*for 'use in' the*

Treaty Arbitration." C-922 at 4 (emphasis added). The Republic has never been a party to the *Lago Agrio* action, has no role in "securing … enforcement" of the Judgment (Jan. 4, 2012 Cl. Ltr. at 3), and has not taken *any* steps—much less "affirmative steps"—to do so. Second, the Claimants rely upon an amicus curiae brief filed by the Respondent with the Second Circuit Court of Appeals on June 9, 2011. R-266, Republic's Amicus Br. (June 9, 2011), filed in *Chevron Corp. v. Naranjo* (2d Cir.). As might be expected, the Republic made its submission in defense of the integrity of its judicial system as a whole in view of Chevron's attacks and the district court's findings. *Id*. at 1 (noting that "the Republic has no interest in either the RICO claims or the underlying Lago Agrio Litigation"). In its submission, the filing of which was *consented* to by Chevron in advance,[1] the Republic did not address the particulars of the *Lago Agrio* Litigation as this Tribunal can affirm by even a quick perusal of the brief. In fact the Second Circuit poignantly criticized Chevron's counsel both for presuming without sufficient basis that the Ecuadorian judicial system was corrupt *and* for seeking to have the New York court resolve the question of enforceability for the domestic courts of sovereigns around the world.[2]

II. Claimants Again Seek An Interpretation of The Tribunal's February 9, 2011 Interim Measures Order That Would Require The Republic To Violate Its Own Laws, Notwithstanding This Tribunal's Previous Refusal(s) Of This Same Request

Notwithstanding this Tribunal's earlier denials of the Claimants' similar requests, and despite their lack of new grounds for claiming that the Republic has not complied with the Tribunal's Interim Measures Order, the Claimants request that the Tribunal require the Republic to:

---

[1] *Id.* at 3.

[2] *See* R-259, Oral Argument Tr., *Chevron Corp. v. Naranjo* (2d Cir. Sept. 16, 2011), at 52-53 ("Don't we have some sense of comity to the legitimacy of the process? Are we just to say to the people of Ecuador you're all corrupt and your process doesn't matter to the United States or a United States federal judge is not going to hear anything about the legitimacy of your process, a process, by the way, which you invoked?"); *see also id.* at 63 ("[H]ow do you think the New York courts would react if a Venezuelan court attempted to enjoin a holder of a judgment from Russia and in New York by enjoining the plaintiffs and saying under Venezuelan law, this is not enforceable so do not go into New York and attempt to enforce a judgment which might be enforceable under New York law because we find it not enforceable under Venezuelan law? Do you think there's any chance that the New York courts would respect such a judgment or should respect such a judgment?"); *id.* at 65-66 ("Is that the same thing as saying that you have the right to have a New York court settle for Australia, for Kazakhstan, for Denmark, for Canada, for Chile, whether under—because the law is not—the judgment is not enforceable under New York law, assuming that's true, that neither is anyone to try to enforce the judgment in any country where it might be enforceable?"); *id*. at 71 ("What would be vexatious [would be] to go to a country where the judgment might be enforceable under that country's law because the New York court has decided that it's not enforceable under New York law?").

- Prevent the court clerk's issuance of the appellate certification. *See* Jan. 4, 2012 Cl. Ltr. at 2; *see also* Jan. 14, 2011 Cl. Ltr. at 15; Mar. 4, 2011 Cl. Ltr. at 8.

- "[I]ssu[e] or decre[e] . . . an order that the Lago Agrio Judgment is not enforceable against Chevron, pending the outcome of this BIT proceeding or further award of the Tribunal." *See* Jan. 4, 2012 Cl. Ltr. at n.3; *see also* Jan. 14, 2011 Cl. Ltr. at 15.

- Order that Chevron is exempt from the bond requirement for filing a cassation appeal. *See* Jan. 4, 2012 Cl. Ltr. at n.3; *see also* Jan. 14, 2011 Cl. Ltr. at 15.

- Post Chevron's bond on its behalf. Jan. 4, 2012 Cl. Ltr. at n.3.

- Order that the *Lago Agrio* Plaintiffs and their representatives not seek enforcement or recognition of the Judgment. *See* Jan. 4, 2012 Cl. Ltr. at n.3.

The Republic has already shown that measures like these, in addition to compromising the very judicial independence that the Claimants purportedly deem essential to delivering justice and complying with the BIT,[3] would categorically violate Ecuadorian law. *See* Feb. 8, 2011 Interim Measures Hearing Tr. at 102:25-110:3. In Ecuador the Constitution is the supreme law of the land.[4] The actions of the Republic's institutions and officials are subject to the Constitutional provisions mandating the separation of powers,[5] protecting the independence of

[3] *See, e.g.*, R-267, Excerpt from Clmts. Counter-Mem. on Jurisdiction (Mar. 31, 2007), filed in *Chevron Corp. and TexPet Petroleum Co. v. Republic of Ecuador*, PCA Case No. AA277, ¶ 236 (Ecuador's failures "to provide a just and independent judicial forum for the effective and fair adjudication of TexPet's claims . . . . constitute violations of the substantive provisions of the BIT and customary international law."); Clmts. Mem. on the Merits (Sept. 24, 2010) ¶ 488 ("Ecuador's political interference in the Lago Agrio Litigation also violates Claimants' right to due process. The facts in the Lago Agrio Litigation are far more egregious than those in *Petrobart v. Kyrgyzstan*, in which the government interfered in the execution of a judgment favoring the claimant . . . . and the tribunal found that such conduct constituted a violation of the FET standard.").

[4] R-215, 2008 Constitution, art. 424 ("The Constitution is the supreme norm and prevails over any other norm in the legal system. The norms and acts of public authority shall maintain compliance with constitutional provisions, otherwise shall have no legal effect."); *id.*, art. 417 ("The international treaties ratified by Ecuador shall be subject to the provisions in the Constitution.").

[5] *Id.*, art. 225 ("The public sector includes: 1. Agencies and organs of the Executive, Legislative, Judicial, and Electoral Transparency and Social Control.").

the judiciary,[6] and limiting the power of institutions and officials to only those powers expressly granted by the Constitution or law.[7]

The Claimants' most recent "wish list" of requested "measures" are no less violative of Ecuadorian law now than they were a year ago. Each measure would require circumventing established judicial procedure in direct violation of Article 168 of the Constitution. Such violations would "lead to administrative, civil and criminal liability" for the entities or individuals who carried out the Claimants' demanded interference with the judiciary.[8] And the Claimants cite no provision or statute that grants to any office or official the power to do what they ask. Thus, the Claimants demand that a representative of the Republic exceed his or her authority.[9]

For example, the Claimants' suggestion that the Republic post a bond on Chevron's behalf would require the Attorney General, as the only person authorized to represent the Republic in Ecuadorian court, to intervene in the *Lago Agrio* action on *Chevron's* behalf to post money for *Chevron* to facilitate *Chevron's* appeal. But the Attorney General does not have the power to intervene in *Lago Agrio* and has no authority to have recourse to State funds to post a bond on behalf of Chevron.[10] Such an action would violate Article 168's protection of judicial independence, potentially subjecting the Attorney General to administrative, civil, and criminal penalties.[11] Ordering that the Respondent grant a waiver of the bond requirement for Chevron in this one case is tantamount to asking Respondent to rewrite its own laws to create a special exemption for Chevron. Neither the letter nor the spirit of the BIT provides a basis or justification for granting a national of a contracting party procedural rights that are greater than those available to all other individuals or entities, regardless of their nationality.

---

6 *Id.*, art. 168 ("The administration of justice in the performance of its duties and in the exercise of its powers, shall apply the following principles: 1. The organs of the Judiciary shall enjoy internal and external independence. Any violation of this principle will lead to administrative, civil and criminal liability in accordance with the law.").

7 *Id.*, art. 226 ("Institutions of the State, its agencies, departments, public servants and persons acting in the exercise of a State power shall exercise only the powers and competences vested with them by the Constitution and the law.").

8 *Id.*, art. 168.

9 *Id.*, art. 226.

10 *See* R-66, Foreign Law Declaration of Genaro Eguiguren, Ernesto Albán and Armando Bermeo (Feb. 6, 2006), ¶¶ 23-24.

11 *See id.* at n.29 ("It is also worth pointing out that, assuming the State's General Attorney attempted to intervene in a legal procedure where the State is not a party – or did not have a legitimate "third party" right – or did it on behalf of a private party's interests – the Attorney General would be personally liable. Said liability could be administrative (failure to perform his duties as a public official), civil (should his actions cause economic harm to the State or to third parties), and/or criminal (e.g., by committing the crime of embezzlement).").

Similarly, there is no "responsible official[]" in the Republic who has the power to direct the "Lago Agrio Plaintiffs, their representatives, their counsel, or any other person who may be deemed the real party in interest in the corpus of the trusts" to not pursue enforcement of the Judgment. *See* Jan. 4, 2012 Cl. Ltr. at 3. The Claimants' suggestion that the Republic could accomplish this by so directing "through its responsible officials, including without limitation its courts, the Superintendent of Companies (which has supervision over trusts in Ecuador), [or] the administrator or directors of any trust established pursuant to the Lago Agrio judgment" (*id.*) would require public officials to exceed their powers and private citizens to disregard an order rendered by competent authority, without prejudice of the liability that may arise against them.[12] Neither the Superintendent of Companies nor any other Ecuadorian official or citizen has the power to direct the aforementioned subjects to a trust to act contrary to its stated purpose. To do so would constitute clear interference with the judiciary.

The procedures governing the legal process in Ecuador are predicated on fundamental principles of justice and due process deeply rooted in the Ecuadorian Constitution.[13] They are intended to protect all litigants before its courts, and cannot be contorted to suit the needs of one litigant over another. The Claimants have claimed in these proceedings that the Executive Branch has wrongfully injected itself into the legal processes by its occasional public comments over the years touching on a matter of public interest (as Presidents and Prime Ministers across the globe are wont to do). But the Claimants ask this Tribunal to order direct and actual State intervention in the court processes. The Republic doubts that this would be lawful in *any* State. It surely is not lawful in Ecuador.

III. Claimants Seek To Prevent Entry of A Final Judgment, Notwithstanding Their Express Promises To the Second Circuit That They Would Not Do So

The Republic understands that the Claimants seek to prevent *enforcement* of a final judgment. But that is different from seeking Interim Measures directing the Republic to take action that would prevent entry of a final judgment by, for example, preventing issuance of the appellate certification. In seeking to prevent entry of a final judgment, the Claimants are violating their express commitments to the United States Court of Appeals for the Second Circuit.

As the Tribunal will recall, the Claimants had obtained dismissal of the *Aguinda* environmental litigation in New York (1993-2002) based on their judicial promises to submit to

[12] R-278, 2008 Constitution, art. 86.4 ("If the judgment is not complied with by public servants, the judge shall order his or her destitution from the office or employment without prejudice of the corresponding civil or criminal liability. When the person failing to comply with the judgment or resolution is a private individual, that person shall incur liability as provided for by law.").

[13] R-266, Republic's Amicus Br. (June 9, 2011), filed in *Chevron Corp. v. Naranjo* (2d Cir.), at 10-11.

the jurisdiction of Ecuador's courts and to satisfy any judgment subject only to their right to defend any enforcement actions.[14] After the Claimants initiated this arbitration, both the Plaintiffs and the Republic petitioned the federal district court in New York for a stay of the BIT arbitration on the ground that Chevron's arbitral claims violated its judicial promises.

During argument of the Republic's appeal from the district court's dismissal, the Second Circuit Panel expressed great concern about the prospect that Chevron would seek arbitral remedies that would undermine its earlier undertaking to submit to the jurisdiction of Ecuador's courts. To persuade the Panel not to stay the BIT arbitration *in toto*, Chevron's counsel represented, albeit with a great deal of reluctance, that Chevron intended to seek indemnification against the Republic, but that it "had no present intent" to ask this Tribunal (as opposed to asking the Ecuadorian courts) to intervene in the Ecuadorian judicial process and prevent entry of a judgment adverse to Chevron. However, the Panel, justifiably wary of a flexible "present intent," responded that this representation was insufficient.[15] After consultation with his client, Chevron's counsel responded as follows:

> *I heard the questions about present intent.* I want to--I do want to be super clear about this. We have not attempted, and we will not attempt, to ask the BIT tribunal to stop entry of a judgment. We do intend to fight enforcement, but we--and we do intend to fight in Lago Agrio against entry of a judgment, **but we have not and we**

[14] *See, e.g.*, R-247, *Republic of Ecuador v. Chevron Corp.*, slip op. (2d Cir., Mar. 17, 2011) at n.4 ("Texaco's promise to satisfy any judgment issued by Ecuadorian courts, subject to its rights under New York's Recognition of Foreign Country Money Judgments Act . . . along with Texaco's more general promises to submit to Ecuadorian jurisdiction, is enforceable against Chevron in this action and any future proceedings between the parties, including enforcement actions, contempt proceedings, and attempts to confirm arbitral awards.").

[15] R-160, Oral Argument Tr. (Aug. 5, 2010), *Republic of Ecuador v. Chevron Corp*. (2d Cir.), at 54-57; *see also id.* at 38-40 ("JUDGE LYNCH: "I hear you saying two different things . . . . One is all we're asking for [is] indemnification . . . . and all that's at stake is whether Ecuador, the Republic, has to indemnify Chevron for any judgment the Plaintiffs get. . . . MR. RANDY MASTRO: Your Honor, the core of that proceeding is to enforce our indemnification rights against the Republic of Ecuador . . . . [T]he interim relief we sought in the arbitration was not to stop the proceedings from concluding to judgment in Lago Agrio."); *id.* at 40-41 ("JUDGE RAGGI: Let's assume you win everything in the arbitration. What's your first statement to the Ecuadorian Court with respect to the plaintiffs' action? MR. RANDY MASTRO: Well actually it will be what the Ecuadorian government has to say to the Court . . . . to say that we in fact are supposed to indemnify . . . . so the judgment you enter there, the government is going to have to pay for it. . . . JUDGE RAGGI: Well that still affords the plaintiffs the opportunity to have the Ecuadorian Court determine what judgment should be entered and what amount and all of that the . . . things that they wish to litigate and then the question will be who pays it? MR. RANDY MASTRO: Yes, . . . there is no restraint that has come out of the international arbitration and we did not ask on an interim basis for any restraint on the court there entering a judgment. We do, we do want that court, the tribunal, to say that that's ultimately entirely the obligation of the government of Ecuador.").

> **will not, if I left any doubt about it, ask the BIT tribunal to stop entry of a judgment in Lago Agrio**."[16]

Shortly after oral argument, Chevron filed a motion to supplement the record, addressed to the same Second Circuit Panel. In its motion Chevron's counsel reaffirmed his client's commitment made at the close of oral argument:

> As Chevron represented at oral argument, however, **and now categorically reconfirms,** Chevron will not ask the Treaty Arbitration tribunal to attempt to prevent the entry of judgment in the Lago Agrio court.[17]

Having received these undertakings from Chevron, the Panel denied the Republic's stay application, finding that Chevron was not judicially estopped from proceeding against the Republic for indemnification. However, the Panel preserved the Republic's remaining issues of "non-arbitrability" for the BIT Tribunal to decide as part of its jurisdictional award.

IV. The Claimants' Request To Convert The Interim Measures Order Into An Interim Award

The Claimants have failed to identify any grounds upon which the Interim Measures Order should be converted into an Interim Award. In the absence of such grounds, the Republic makes two general points:

First, as a preliminary matter, the Republic fully *complied* with the Interim Measures Order, as shown above. The Republic specifically advised this Tribunal of the measures it had undertaken, and this Tribunal (twice) declined Chevron's request that the Republic be required to do more.

Second, the Claimants' new allegations are false, exaggerated, or both. The Claimants assert that there is overwhelming evidence of fraud in the case. But as the United States Court of Appeals for the Third Circuit observed when faced with many of these same accusations, "the circumstances supporting [Chevron's] claim of fraud largely are allegations, and allegations are not factual findings."[18] Chevron's repeated insistence that the scales of justice in Ecuador are tipped against it ignores that Chevron has won numerous lawsuits in Ecuador, including against the Republic itself. Even the criminal case in which two of its attorneys were defendants—and

---

16 *Id.* at 94 (emphasis added).

17 R-268, Chevron Mot. to Supp. (Aug. 13, 2010), filed in *Republic of Ecuador v. Chevron Corp.* (2d Cir.), at 4 (emphasis added).

18 R-269, *In re Application of Chevron Corp.,* 650 F.3d 276, 294 (3d Cir. 2011).

which once comprised a substantial portion of its arbitral complaints—was dismissed over the Prosecutor's objections. The Claimants likewise fail to acknowledge that the *Lago Agrio* Plaintiffs strongly contest Chevron's allegations.[19]

The Republic will briefly correct the most egregious of the Claimants' mischaracterizations and omissions but, as previously stated, none of this "new evidence" relates to the ground that was originally asserted to justify interim measures and that ground has now expired:

- As the full text of the August 2008 email exchange between Donziger and Fajardo (C-993) makes clear, Fajardo's reference to "work[ing] with the new judges" was not to drafting a judgment, but was a response to Donziger's plea to work out a plan to "speed things up." It is also unclear whether it relates to the *Lago Agrio* trial, since Judge Núñez had been presiding over the matter since January 2008, and no judge rotations had been implemented or were contemplated at the time of the email.

- C-994 is not evidence for the proposition that the Philadelphia law firm of Kohn, Swift & Graf was surreptitiously drafting a judgment. Instead, as Mr. Donzinger testified at deposition, he and the Kohn firm—which had financed the litigation since its 1993 filing in New York, but had not actively participated in the Ecuadorian proceedings—"had discussions about how the process worked and whether the Alegato [Plaintiffs' closing brief] might be similar to proposed findings of fact/conclusions of law [as per U.S. practice] that could potentially be adopted."[20]

- Farjardo's statement in a December 2009 email (C-1001) that he was "99.99 percent sure" that "the plan for the judgment will be fulfilled," was a reference to "his plan to

[19] R-270, Defendants' Sur-Reply to Chevron's Motion for an Order of Attachment and Other Relief (Dec. 29, 2011), filed in *Chevron Corp. v. Donziger*, No. 11-CV-0691 (LAK) at 2 ("[L]est there be any doubt, Defendants deny Chevron's allegations of 'extortion, fraud, or money laundering.' . . . Defendants deny they ghost-wrote the Ecuadorian judgment. In fact, in Count 9, even in the limited time granted, Defendants produced affidavits contradicting Chevron's paid-expert charges that the opinion was ghost-written . . . . Chevron takes the limited discovery in this case and jumps to 'conclusions' that in fact do not exist. In truth, the Ecuadorian judgment is the Ecuadorian Court's own, and Chevron has already made such arguments to the Ecuadorian legal system"); s*ee also* R-271, Excerpts from the Deposition of Andrew Woods (Sept. 14, 2011) at 145 ("But you knew that . . . representatives of the LAPs had . . . . ghost-written the judgment and paid Cabrera hundreds of thousands of dollars to do it, didn't you? . . . A. I don't think that any of what you just said is accurate."); R-272, Excerpts from Deposition of Laura Garr (Sept. 11, 2011) at 378 ("What role did the plaintiffs play in crafting that judgment? . . . A. I don't know of anything . . . . Q. [D]id the plaintiffs play a role in drafting that judgment? . . . A. Not to my knowledge.").

[20] R-273, Excerpts from Deposition of Steven Donziger (July 19, 2011) at 4757; *see also* R-274, Excerpts from Deposition of Aaron Page (Sept. 15, 2011) at 170 ("Did Kohn Swift & Graf ever create a draft of a Lago Agrio judgment? A. Not that I'm aware of.").

get the case finished," not a reference to some secret plan to undertake *writing* the Court's judgment.[21]

- While Chevron here claims that the text of the *Conelec* decision by the Ecuadorian Supreme Court included in a Fajardo email (C-997) "contains numerous mistakes not found in any published version of the court opinion itself," all of which were repeated "exactly" in the Zambrano Judgment (Jan. 4, 2012 Cl. Ltr. at 3-4), a filing by Chevron in the RICO case shows that none of the three sources it cites (the text reproduced in the Fajardo email, the text in a published version, and the text in the Judgment) is in fact "exactly" the same.[22] Nor is there any proof whatsoever for Chevron's speculation that Judge Zambrano would have had to resort to an internal email from the Plaintiffs for the citation of a published Ecuadorian court decision.

- The Claimants cite various expert reports they commissioned to support their assertion that "the Lago Agrio Judgment contains direct plagiarisms from the Plaintiffs' internal work product that was never filed in the record." Jan. 4, 2012 Cl. Ltr. at 4. For example, they cite C-1004, the Report of Robert A. Leonard with respect to an internal Plaintiffs' memorandum regarding the merger of Chevron and Texaco (the "Fusion" memo) (a topic that, in any event, had been extensively briefed by Plaintiffs in their closing *alegato* submitted to the Court). But expert reports commissioned by the Plaintiffs and filed in U.S. courts reach different conclusions. According to Plaintiffs' expert, Dr. Ronald Butters, former chair of the Duke University Linguistics Program and Department of English, any textual similarities between the Judgment and the Fusion Memo "could derive from other documents that [Chevron's experts] do not analyze; that is to say, their reports do not demonstrate that the *Fusion Memo* is the source for any 'overlap' in text."[23] Chevron's experts' "characterization, as *plagiarism*, of the putative 'overlap' of the [Judgment] and the *Fusion Memo* is misleading and prejudicial . . . . [and] the portions of the [Judgment] that [Chevron's experts] assert are drawn from the *Fusion Memo* represent a miniscule portion of the [Judgment], and thus do not speak to the actual authorship of the work."[24] Dr. Butters further concluded that Chevron's expert reports were based on "scientifically controversial" methodologies, "considered by many highly respected members of the forensic linguistic community to be fundamentally

---

21 R-273, Excerpts from Deposition of Steven Donziger (July 19, 2011) at 4789-91.

22 R-275, Excerpts from Declaration of Mary Beth Maloney (Dec. 20, 2011), filed in *Chevron Corp. v. Donziger*, No. 11-CV-0691 (LAK) ¶ 4.

23 R-276, Excerpts from Rebuttal Report of Ronald R. Butters, Ph.D., at 36-37.

24 *Id.* at 37.

unscientific, untested, deeply flawed, and often likely to generate false conclusions."[25]

- Claimants cite a March 2007 email (C-1005) as "document[ation that] the Lago Agrio Court took direction from Ecuador's Executive which has continually interfered in the Lago Agrio litigation." Jan. 4, 2012 Cl. Ltr. at 5. In the email, Eugenia Yepez, who had "PR related responsibilities on behalf of the plaintiffs' team,"[26] claimed to Donziger that she had had an "unexpected" meeting with President Correa and that the President had "asked the [then] Attorney General to do everything necessary to win the trial and the arbitration in the U.S. [*i.e.*, the AAA arbitration Chevron had brought against the Republic] . . . . He gave us fabulous support. He even said that he would call the judge." C-1005. Even assuming that Ms. Yepez was being truthful and not simply attempting to curry favor with Donziger, there is nothing to suggest that a call was ever made. Certainly nothing came of the encounter since the *Lago Agrio* trial continued on for nearly four more years. And while President Correa subsequently publicly expressed sympathy for the plight of the residents of the *Oriente*, he also insisted that *Lago Agrio* was a case brought by private Ecuadorian citizens in which the State would not interfere.[27]

V. The Claimants Have Mischaracterized The Court Of Appeals' Judgment

The Claimants contend that the Court of Appeals in *Lago Agrio* "refused to consider the issues of fraud and corruption committed by the Plaintiffs' attorneys and representatives throughout the Lago Agrio proceedings (including the ghostwriting of the Judgment), finding that it did not have jurisdiction to consider whether the Judgment had been obtained by fraud, and simply refusing to address the evidence of such fraud."[28] This is an egregious mischaracterization of the court's decision. The court addressed allegations of "fraud and corruption of plaintiffs, counsel and representatives, [all of which are the subject of a RICO action in the US]," and noted that it "has no competence to rule on the *conduct* of [those

---

[25] *Id.*

[26] R-277, Excerpts from Deposition of Steven Donziger (Dec. 8, 2010) at 774.

[27] *See, e.g.*, R-154, Tr. of President Correa's press conference (Apr. 26, 2007) at 2 ("the President cannot intervene in a legal matter"); R-155, EL MERCURIO (May 1, 2007) at 1 (President Correa "confirmed that the National Government would not interfere in the judicial process"), R-156, Letter from Amb. Gallegos to *The Wall Street Journal* (Apr. 26, 2008) ("President Rafael Correa's government has drawn a clear line between where sympathy for contamination victims ends and interference in an ongoing complex legal dispute begins.").

[28] Jan. 4, 2012 Cl. Ltr. at 5.

parties]."[29] Under Ecuadorian law, the appellate court's mandate is limited to determining whether the judgment should be affirmed or reversed in light of the evidence.[30]

But while the Court of Appeals lacks the authority to sanction the parties or other participants in the judicial process for potential misconduct, the Court clearly considered the substance of Chevron's complaints in determining whether the record evidence supported the decision:

> As for the assertion that in the trial court evidence that is not in the case record was considered, the Division has reviewed the pages of Chevron's appeal brief designated with numbers 55 and 56 in which it asserts that the judgment refers to various samples that supposedly are included in the filings to reach the conclusion that the former concession area is contaminated.

C-991, Court of Appeals Decision (Jan. 3, 2012) (Eng. translation) at 11. The Court of Appeals then specifically identifies in its decision, frequently by page number to the massive trial record, the many sources of the scientific data supporting the first instance court's findings of contamination. *Id.* According to the Court of Appeals, Article 115 of the Code of Civil Procedure requires that evidence "be assessed as a whole." *Id.* at 12. The Court of Appeals, having combed the trial court record, concluded that the first instance court did just that, and that the record as a whole supported the decision.

In sum, Chevron's request to vacate the judgment based on fraud and denial of due process was carefully examined and deemed unfounded by the Court of Appeals. National judiciaries are entitled to deference and a presumption of correctness in international law,[31] and

---

[29] C-991, Court of Appeals Decision (Jan. 3, 2012) (Eng. translation) at 10.

[30] R-279, Ecuadorian Code of Civil Procedure, art. 334 ("The judge before whom the referred appeal is lodged may ratify, reverse or modify the ruling under appeal, based on the merits of the proceedings, including when the lower court judge has omitted a decision on one or several of the disputed points in his ruling. In this case, the higher court judge shall rule on them and shall set a fine between fifty cents of a US dollar to two US dollars and fifty cents, for said omission.").

[31] RLA-150, DANIEL P. O'CONNELL, INTERNATIONAL LAW, 948 (2d ed. 1970) ("[T]here is a presumption in favour of the judicial process."); RLA-151, 5 HACKWORTH DIGEST OF INTERNATIONAL LAW, § 522, 526-27 (1943) ("[W]ith but few exceptions judgments of the[] courts of last resort are considered to be and are accepted as just and proper. There is, therefore, a strong presumption in favor of their correctness."); RLA-152, *Putnam (United States v. United Mexican States)* (Opinion of Commissioners of Apr. 15, 1927) U.S.-Mex. Cl. Comm'n, 225 (Foreign court decisions "must be presumed to have been fairly determined."); RLA-153, Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice:* Loewen v. US *and* Chattin v. Mexico, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY LAW (Todd Weiler ed., 2005), 7 ("[T]here must be a presumption of deference to the foreign court whose performance is being judged;

the Respondent respectfully requests that the Tribunal give more weight to the reasoned conclusions of the Ecuadorian Court of Appeals than to the Claimants' exaggerated and unsubstantiated accusations.

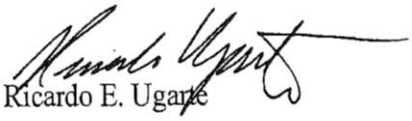
CONCLUSION

For the foregoing reasons, the Republic respectfully requests that the Claimants' requests be denied in their entirety and that the Interim Measures Order be vacated.

Respectfully submitted,

Francisco Grijalva
Procuraduría General del Estado

Zachary Douglas
Matrix Chambers



Ricardo E. Ugarte
Winston and Strawn LLP

Enclosures

cc: Mr. R. Doak Bishop
Mr. Wade M. Coriell
Ms. Isabel Fernández de la Cuesta
Mr. Edward G. Kehoe
Ms. Caline Mouawad
Mr. James Crawford SC
Dr. Diego García Carrión
Mr. Luis González
Mr. Eric W. Bloom

---

such courts have a certain sovereign 'majesty'; and contrariwise the reviewing international tribunal must not sit as a 'court of appeal' over the foreign court.").

Mr. Tomás Leonard
Mr. C. MacNeil Mitchell